



# STATE OF NEW JERSEY

**Board of Public Utilities**

**Two Gateway Center**

**Newark, NJ 07102**

**[www.bpu.state.nj.us](http://www.bpu.state.nj.us)**

## OFFICE OF CABLE TELEVISION

IN THE MATTER OF ALLEGED NON-COMPLIANCE )  
BY RCN OF NY, A WHOLLY-OWNED SUBSIDIARY )  
OF RCN CORPORATION, WITH THE )  
REQUIREMENTS OF N.J.S.A. 48:5A-15, 16, 17 AND )  
22 REQUIRING MUNICIPAL CONSENT FROM THE )  
CITY OF JERSEY CITY AND A CERTIFICATE OF )  
APPROVAL FROM THE BOARD FOR NEWPORT )  
COMMUNITY IN JERSEY CITY, NEW JERSEY )

## ORDER DENYING RCN'S MOTION FOR A STAY

Docket No. CC03010023

## SERVICE LIST ATTACHED

BY THE BOARD:

The New Jersey Board of Public Utilities (Board), Office of Cable Television, pursuant to N.J.S.A. 48:5A-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all cable television systems which operate within the State of New Jersey, subject only to the limitations of Federal law. The within matter was opened to the Board by a motion, filed pursuant to N.J.A.C. 1:1-18.6, by RCN of NY (RCN) on September 4, 2003, seeking a stay, pending appeal, of implementation of the Final Order issued in this matter by the Board on April 23, 2003, and reconfirmed following a motion for reconsideration on June 18, 2003. The initial Board Order that RCN is seeking to have stayed is currently under review by the New Jersey Superior Court, Appellate Division, under Docket No. A-6422-02T3.

RCN claims that a stay is appropriate in this matter because of the high likelihood of RCN being successful on the merits in the Appellate Division, in the interest of "maintaining the status quo pending a judicial resolution of the legal conclusions of this matter," (RCN Petition, at ¶ 3), the presence of Comcast Cablevision of Jersey City, LLC (Comcast) as a franchised cable television provider in the Newport complex, and because the filing of a request for municipal consent "would be unduly confusing and is not an effective use of public resources." (Ibid.)

As a preliminary matter, under the Final Order, the Board directed RCN to file, within 60 days of the date of the Order, for a Certificate of Approval as required by N.J.S.A. 48:5A-17(a) and file for municipal approval from the City of Jersey City as required by N.J.S.A. 48:5A-22. The deadline for that filing passed on June 22, 2003, and while RCN filed for reconsideration, which was denied on June 18, 2003, RCN never sought to have the requirements of the motion stayed pending the reconsideration. In the absence of a specific request, the filing of a motion for reconsideration does not result in a staying of the requirements of any Order covered in the motion. N.J.A.C. 14:1-8.7(d). Accordingly, RCN is currently in default of the April 23, 2003 Order, and this stay

application, even if it were to be granted, would not cure the violation; it would only toll the time upon which a penalty would be calculated.

Even beyond the untimely nature of the request for a stay, RCN's application should be denied. A stay pending appeal is an extraordinary equitable remedy, and is used only in limited circumstances and with significant restraint, and only when the movant establishes: 1) a likelihood of success on the merits, 2) irreparable injury to the movant absent a stay, 3) no substantial harm to other parties, and 4) no harm to the public interest. Virginia Petroleum Jobbers Assoc. v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); United States v. Key Oil Co., Inc., 460 F. Supp. 878, 878 (D.N.J. 1978), citing Pitcher v. Laird, 415 F.2d 743, 744-45 (5<sup>th</sup> Cir. 1969); Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). A stay is not a matter of right, even if irreparable harm may otherwise result. Yakus v. United States, 321 U.S. 414, 441, 64 S. Ct. 660, 675, 88 L. Ed. 834 (1944). Instead, it is an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and "consideration of justice, equity and morality." Virginia Railway Co. v. United States, 272 U.S. 658, 672-73, 47 S. Ct. 222, 228, 71 L. Ed. 463, 471 (1926). Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F.2d 676, 678 (10<sup>th</sup> Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites. United States v. Lambert, 695 F.2d 536, 539 (11<sup>th</sup> Cir. 1983). In deciding requests for relief such as this, the Board has applied the same standard used by the trial courts. See, e.g., I/M/O Jersey Central Power and Light Co., Docket No. EM92030359, at 2 (March 7, 1994).

In this matter, RCN has failed to make the necessary showing for a stay to issue. Despite RCN's claim to the contrary, there is no binding authority in favor of RCN's legal position. Instead, the decision of the Eighth Circuit Court of Appeals in Guidry Cablevision/Simul Vision Cable System v. City of Baldwin, 117 F.3d 383 (8<sup>th</sup> Cir. 1997), relied upon by RCN, is balanced against the decision of the Iowa Supreme Court in Mason City v. City Center of Mason City, Inc., 634 N.W.2d 667 (Iowa 2001), found persuasive by the Board, and neither decision is binding upon either the courts of this State or the Board. See, e.g., Pollution Control Financing Authority of Warren County v. County of Somerset, 324 N.J. Super. 391, 408 (App. Div. 1999). The Board's decision to adopt and act upon the rationale presented in the Mason City decision rather than the Guidry Cablevision decision is not foreclosed by regulation, statute or case law, and thus RCN's claim of a significant likelihood of success is unfounded.

Likewise, the other arguments raised by RCN are also insufficient to satisfy the requirements of a stay. The "maintaining the status quo pending a judicial resolution of the legal conclusions of this matter" is inappropriate when, as in this case, RCN has been granted a number of opportunities to be heard before the Board. The Board, through an Initial Order, a Final Order, and a reconfirmation of the Final Order made through reconsideration, has made a reasoned determination. While RCN has the right to seek appellate review, the interests of the residents of Newport to have regulated, quality cable television service outweighs the interest RCN may have in receiving a final judicial determination prior to seeking municipal approval.

Similarly, the Board Order directing Comcast to enter into the Newport complex to provide service, issued by the Board on August 7, 2003, in Docket No. CE01090585, provides no basis for a stay for RCN. The presence, or absence, of a competing cable television service provider does not in any way impact upon RCN's satisfaction of the federal definition of a cable television service provider under 47 U.S.C. §522(7). Finally, the negotiation process between RCN and Jersey City will take some time, during which the appellate process will continue, and while there may be a possibility of a modification based upon this review, RCN does not have standing to raise the issue of inconvenience or harm to Jersey City; Jersey City had the opportunity to raise this issue and declined to do so. Moreover, the needs of the public interest, in this case providing appropriate

service to the cable subscribers of the Newport complex in Jersey City, would be harmed by the imposition of the requested stay.

Accordingly, based upon the above, the Board HEREBY FINDS that the requirements for the issuance of a stay of the Board's Order have not been met. Therefore, the Board HEREBY DENIES RCN's motion for a stay and HEREBY ORDERS that RCN comply with the requirements of the Final Order issued on April 23, 2003. In light of the failure of RCN to file for municipal consent and a Certificate of Approval prior to the June 22, 2003 deadline, the Board FURTHER ORDERS that RCN shall be subject to the statutory penalty for its ongoing violation of the Board Order, running from June 22, 2003 through the date of cure.

DATED: September 11, 2003

BOARD OF PUBLIC UTILITIES  
BY:

(signed)

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JEANNE M. FOX  
PRESIDENT

(signed)

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FREDERICK F. BUTLER  
COMMISSIONER

(signed)

\_\_\_\_\_  
CAROL J. MURPHY  
COMMISSIONER

(signed)

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CONNIE O. HUGHES  
COMMISSIONER

(signed)

\_\_\_\_\_  
JACK ALTER  
COMMISSIONER

ATTEST:

(signed)

KRISTI IZZO  
SECRETARY

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DOCKET NO. CC03010023

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